UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA	:	
- v. -	:	12 Cr. 825 (JGK)
MARK HOTTON,	:	
Defendant.	:	

- x

SENTENCING MEMORANDUM OF THE UNITED STATES OF AMERICA

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SENTENCING MEMORANDUM

The Government respectfully submits the following memorandum in connection with the sentencing of Mark Hotton (the "defendant"), which is scheduled for October 10, 2014 at 10:00 a.m. For the reasons that follow, the Government submits that a sentence within the parties' stipulated Guidelines range of 33 to 41 months' imprisonment would be sufficient, but not greater than necessary, to serve the legitimate purposes of sentencing set forth in Title 18, United States Code, Section 3553(a).[1]

I. BACKGROUND

A. <u>Offense Conduct</u>

The defendant was charged in November 2012 by indictment 12 Cr. 825 (JGK) with two counts of wire fraud, in violation of Title 18, United States Code, Section 1343. The charges stem from the defendant's role in orchestrating two different fraud schemes, both of which

[1] As detailed further below, the U.S. Probation Department, in the course of preparing its Presentence Report ("PSR") independently determined the advisory, applicable Guidelines' range to be 47 to 57 months' imprisonment – based on Probation's recommendation that the Court deny any downward adjustment for acceptance of responsibility. While neither Probation nor the Court is bound by the parties' agreement, the Government intends to honor the terms of its plea agreement with the defendant and will therefore refer throughout to the stipulated Guidelines range of 33 to 41 months' imprisonment.

followed the same general pattern – the defendant solicited thousands of dollars in up-front fees from victims who believed the defendant would assist them in raising much needed funding for their corporate endeavors. When no such funding materialized, the victims were not only short the up-front fees charged the defendant but they found themselves without funding they had been all but guaranteed and on which they had relied in developing corporate plans.

To perpetrate these schemes – and, in particular, to continue soliciting fees from his victims – the defendant used a host of elaborate ruses, including fake documents, corporate entities, websites, and even entirely fabricated "investors" to whom the defendant ascribed e-mail addresses, staff, families, and even, in one case, an untimely death from malaria. Through his conduct, the defendant caused a direct financial loss to his victims more than $500,000. The indirect losses and harm caused to his victims, as discussed below, were even more substantial.

The Rebecca Scheme

As detailed in the Criminal Complaint in this matter, a copy of which is attached hereto as Exhibit A, as well as in the Presentence Report prepared by the U.S. Probation Department (the "PSR" and "Probation," respectively), the defendant was initially put in contact with the producers of Rebecca the Musical in early 2012. At that time, and as the defendant quickly learned, the producers were several million dollars short of fully financing the production which had a budget of approximately $12 million to $14 million. (PSR ¶¶ 16, 18.) In initial conversations with the producers, the defendant assured them that he could help quickly raise funds for the show which was expected to open on Broadway that fall. (*Id.* ¶¶ 19-21.) The producers then agreed to retain the defendant's services, executing a contract with him in which the defendant was to be paid a $7,500 initial fee along with a percentage of the funds he raised. Additionally, and critically for purposes of the scheme, the defendant was also entitled to

reimbursement for various expenses occurred in the course of his efforts to raise money for the producers. (*Id.* ¶¶ 21-22.)

Shortly thereafter, the defendant gave the producers the first in a series of false assurances – the defendant told the producers that he had "soft circles on $3.18 million" in financing. (*Id.* ¶ 24.) Several weeks later, the defendant further elaborated on his ostensive success, identifying four foreign investors interested in the production, including a "Paul Abrams" of London. The defendant further told the produces that these investors were willing to collectively invest up to $4.5 million dollars in Rebecca. (*Id.* ¶ 26.) None of these "investors" actually existed – each was a fictional character created by the defendant – nor, of course, were any of these "investors" actually able or willing to provide financing to Rebecca. But as the defendant well knew, at the time, the musical was approximately $4 million short of being fully financed, and by assuring the producers that he could fill that gap – and thereby assure the show's successful opening on Broadway as scheduled – the defendant made himself indispensable to the producers, thereby ensuring that they would continue to pay his fees and cover the expenses he purported to incur.

To further the ruse, the defendant gave his fabricated investors e-mail addresses – even fabricating e-mail correspondence between these investors and the producers – as well as assistants, corporate associations, and even family members, introducing one of the producers to Paul Abrams' "niece" at one point as part of the scheme. (*Id.* ¶¶ 35-36.) The defendant also solicited money – thousands of dollars at a time – as "expenses" for his work in recruiting and delivering these "investors." For example, in April 2012, the defendant demanded reimbursement of more than $18,000 for a safari on which he claimed to have just taken "Paul

Abrams" and Abrams' eldest son. The producers, having been told Abrams planned to invest several million dollars or more in Rebecca, readily complied. (*Id.* ¶¶ 31-32.)

Because none the fictional investors identified by the defendant actually existed, the producers received no actual funds, and, as the opening date of Rebecca approached, the producers became increasingly anxious to collect. Faced with the prospect of being caught, the defendant simply came up with a new lie – he killed off the lead investor, "Paul Abrams," telling the producers Abrams had died of malaria while traveling with his family in August 2012. Worse still, the defendant told the producers that without Abrams, none of the other investors was willing to go forward with their portion of the financing. (*Id.* ¶¶ 38-47.)

Instead, the defendant proposed a new alternative to the producers, telling them that he could help broker a short-term loan, in return, of course, for a substantial fee. In particular, the defendant promised to connect the producers with a lender – "SPS Equity" – which the defendant further assured the producers would be willing to extend them a seven-figure line of credit. The defendant's fee for these arrangements was an additional $20,000, which the increasingly desperate producers paid immediately. (*Id.* ¶ 51.) No loan initially came through, however, from "SPS Equity," which was, in fact, another of the defendant's fabrications. According to the defendant, the problem could be solved it the producers put forward more collateral to secure the loan, collateral the defendant was willing to provide on their behalf in return for yet another substantial payment. The producers again transferred money to the defendant to no avail. (*Id.* ¶ 53.)

Finally, in late September 2012, and just weeks before the scheduled opening of the musical, the producers realized they would not be able of secure the financing promised them by the defendant. Shortly thereafter, in early October 2012, the producers announced cancellation

of the production, one which was to have employed up to 130 theater professionals, all of whom were suddenly rendered jobless.[2] (*Id.* ¶ 16.) Through the course of the scheme described above, the defendant managed to purloin nearly $75,000 from the producers in the form of fees or expenses, all obtained under false and fraudulent pretenses.

The Connecticut Real Estate Scheme

During approximately the same time period, the defendant was also involved in an equally elaborate – and even more financially lucrative – fraud scheme targeting a Connecticut-based real estate company (the "Real Estate Company"). In this scheme, as in the scheme described above, the defendant falsely represented that he had the ability to help obtain financing for various business ventures the Real Estate Company was interested in pursuing. In this scheme, as in the scheme above, the defendant then identified potential sources of funding for the Real Estate Company, all of which were entirely fabricated by the defendant. And in this scheme, as in the scheme above, the defendant solicited tens of thousands of dollars in up-front fees and expenses from the president of the Real Estate Company, ostensibly in return for assistance in obtaining financing. No financing was ever obtained for the Real Estate Company, which was induced over the course of nearly one year to provide the defendant with hundreds of thousands of dollars. (*Id.* ¶ 62.)

In particular, and further detailed in both the Criminal Complaint and the PSR, in approximately September 2011, the defendant was put in contact with the president of the Real Estate Company who was, at the time, was seeking financing for a series of corporate projects the Real Estate Company was then considering. The President of the Real Estate Company then met with the defendant who promised he could help and, in particular, identified contacts at

[2] *See* Felicia R. Lee, "Demise of 'Rebecca' Costs More Than Money," *The New York Times*, Oct. 5, 2012 *available at*: http://www.nytimes.com/2012/10/06/theater/failure-of-musical-rebecca-costs-more-than-money.html?adxnnl=1&adxnnlx=1412457940-DFUQ9cVC2rSQAm3Y3M+cwA (last visited Oct. 4, 2014).

several companies – "Pacific Ventures" and "Mezzanine Capital" – which the defendant represented would be able to help the Real Estate Company secure funding. In truth, there was no "Pacific Ventures" nor any "Mezzanine Capital." Both were pure fabrications, created by the defendant. However, the fabrications were elaborate, and as part of the scheme, the defendant also created fictitious employees at both companies, *i.e.*, "contacts" with whom the President of the Real Estate Company believed he was corresponding via e-mail addresses also provided by the defendant. None of these "contacts" existed, and, indeed, the employees identified by the defendant at both companies – a "Milton Silverstein" and a "Paul Thomas" – used some of the very same e-mail addresses ascribed to the foreign investors by the defendant in his dealings with the producers of Rebecca the Musical. (*Id.* ¶ 64.)

After using e-mails from the "contacts" described above to string along the President of the Real Estate Company for nearly six months, in March 2012, and with no financing forthcoming from either "Pacific Ventures" or "Mezzanine Capital," the defendant identified a third firm, "CPS Equity," which the defendant represented could help the Real Estate Company obtain financing. According to the defendant, CPS Equity would charge a "fully refundable" $200,000 up-front fee which the President of the Real Estate Company, having grown increasingly desperate to obtain financing, was willing to pay. (*Id.*) The defendant further instructed the President to wire more than $100,000 in additional fees to another company, "Clinical Response Solutions," which the President also did. (*Id.*)

No financing came through, however, so in May 2012, the defendant told the President of the Real Estate Company that they would have to circle back to "Pacific Ventures" and "Mezzanine Capital," both of which, the defendant represented, might now be able to help. Ostensibly toward that end, the defendant solicited hundreds of thousands of dollars in additional

fees and "expenses." In particular, between May and October 2012, the defendant convinced the President of the Real Estate Company to transfer an additional $450,000 to accounts under the defendant's control, all for financing from companies and contacts that did not exist. (*Id.*)

In total, between September 2011 and October 2012, the defendant obtained more than $750,000 from the Real Estate Company, a substantial portion of that under false and fraudulent pretenses. (*Id.*)

The Defendant's Guilty Plea

On July 29, 2013, the defendant appeared before the Court to enter a guilty plea to both counts of the Indictment pursuant to an agreement with the Government. (*Id.* ¶ 5.) As detailed further below, as a condition of that agreement, the parties stipulated to total loss amount of $500,000 and a Guidelines range of 33 to 41 months' imprisonment.

The Eastern District Proceedings

In October 2012, the defendant was also indicted in the Eastern District of New York on unrelated charges of wire fraud and money laundering. *See United States* v. *Mark Hotton*, 12 Cr. 649 (JS). The charges in that district stem from the defendant's involvement in a series of fraudulent schemes, including use of his position as the owner of several contracting business to loot employee benefit plans, and use of his position as a financial advisor to commit repeated acts of securities fraud. The schemes charged in that proceeding cover a substantially longer time period – the Indictment in that case spans conduct occurring from 1995 to October 2012 – and caused a total loss in excess of $15 million.

On July 30, 2013, the defendant pleaded guilty to those and other charges pursuant to a separate agreement with the U.S. Attorney's Office for the Eastern District of New York. According to the terms of that agreement, the parties agreed to a stipulated Guidelines range of

135 to 168 months' imprisonment. Probation in that district, however, has independently calculated the defendant's applicable Guidelines range on those charges as 360 months to life imprisonment and is recommending a sentence of 180 months' imprisonment. Sentencing in that case is scheduled to occur before the Honorable Joanna Seybert on November 13, 2014.

The Defendant's Release on Bail and Subsequent Remand

Shortly after his guilty pleas, on July 31, 2013 the defendant was released on bail after Judge Seybert, in the Eastern District, set a substantial bail package which included home detention with electronic monitoring, among other conditions. (PSR ¶ 6.) On October 15, 2013, Pretrial Services in the Eastern District along with attorneys for the Government submitted notice to Judge Seybert of numerous, substantial violations of the defendant's conditions of release, and seeking remand. A copy of that notice, which fully details the defendant's violations and is excerpted at length in the PSR, is attached as Exhibit B. Among the violations, the defendant had repeatedly lied to Pretrial Services and the Government about his whereabouts, the nature of his employment while on release, and the value of the property securing his bond. Most troubling, the defendant appeared to have continued to engage in the same sort of conduct underlying the instant charges – namely fabricating documents and e-mails, including e-mails to Pretrial Services ostensibly from his employer that had, in fact, been generated by the defendant himself. (Ex. B at 2-3.) Moreover, when confronted by his employer, the defendant threatened him, telling the employer the defendant was a Government cooperator who could cause a federal prosecution to be commenced against that employer. (*Id.* at 3.)

On October 17, 2013, Judge Seybert held a hearing on the Government's request, determined that the defendant had repeatedly violated the conditions of his release, and ordered him remanded. (PSR ¶ 7.)[3]

B. The Guidelines

1. The Parties' Plea Agreement

As stipulated to by the parties as a condition of the plea agreement, the November 1, 2013 Guidelines manual is applicable to the defendant in the following manner:

Under the Guidelines, Counts One and Two are grouped together pursuant to U.S.S.G. § 3D1.2(b) because the offense level is determined largely by the total amount of loss or harm. The applicable Guideline provision for the Group is U.S.S.G. § 2B1.1, and pursuant to U.S.S.G. § 2B1.1(a)(1), the base offense level is 7.

Pursuant to U.S.S.G. § 2B1.1(b)(1)(I), 14 levels are added because the loss amount was more than $400,000 but not more than $1,000,000. An additional two levels are added because the offense involved the use of sophisticated means. U.S.S.G. § 2B1.1(b)(10).

Finally, pursuant to U.S.S.G. § 3E1.1(a) and (b), a three-level reduction is warranted for the defendant's timely demonstration of acceptance of responsibility. The defendant's total adjusted offense level for Counts One and Two is thus 20.

While the defendant has a number of prior arrests and convictions, all of which are detailed fully in the PSR, none results in criminal history points. As such, the defendant is in Criminal History Category I which, with an offense level 20, results in an advisory, applicable Guidelines range of 33 to 41 months' imprisonment (the "Stipulated Guidelines Range").

[3] The PSR indicates the date of remand as October 23, 2013. (PSR ¶ 7.) According to the docket, however, the hearing and remand order were both dated October 17, 2013.

2. *The PSR*

The Guidelines' range as independently determined by Probation largely mirrors the parties' calculation as set forth above. However, based on the defendant's conduct while on release, Probation has determined that the defendant does not qualify for any reduction for acceptance of responsibility. In particular, and citing to the Second Circuit's recent opinion in *United States* v. *Chu*, 714 F.3d 742 (2d Cir. 2013), Probation takes the position that the defendant's "continued criminal conduct" even after his guilty plea in this case is inconsistent with credit for acceptance of responsibility, notwithstanding the terms of the parties' plea agreement. (PSR at 48.) As such, Probation calculates the total offense level as 23, which given the defendant's placement in Criminal History Category I, results in a Guidelines range of 46 to 57 months' imprisonment.

Probation also recommends a sentence at the high-end of that range, urging the Court to impose a term of 57 months' imprisonment. That recommendation "reflects the defendant's outrageous conduct in committing his frauds, his failure to accept responsibility, and our belief that, as evinced by Hotton's recalcitrant behavior throughout this case, his recidivism risk is high." (*Id.* at 49)

* * * *

While the Government does not dispute Probation's determination that the defendant's post-plea conduct could provide a basis for denying the defendant an adjustment for acceptance of responsibility and certainly does not question this Court's authority and responsibility to correctly and independently determine the applicable Guidelines range irrespective of any agreement between the parties, as noted above, the Government intends to honor the terms of its

plea agreement and will thus refer in this submission principally to the Stipulated Guidelines Range.

II. DISCUSSION

In light of the nature of the instant offense as well as the history and characteristics of this defendant, the Government respectfully submits that a sentence within the parties' Stipulated Guidelines Range of 33 to 41 months' imprisonment would be sufficient, but not greater than necessary, to serve the legitimate purposes of sentencing. As set forth more fully below, the defendant is a serial fraudster whose conduct caused hundreds of thousands of dollars in direct harm, while effecting an untold toll of those whose lives his fraud touched. A substantial sentence is thus necessary and appropriate to reflect the seriousness of the offense, provide sufficient specific deterrence, and to protect the public from further crimes of the defendant.

Indeed, application of the Section 3553(a) factors in this case militate forcefully in favor of a sentence within the Stipulated Guidelines' Range:

First, a substantial sentence is necessary to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment. *See* 18 U.S.C. § 3553(a)(2)(A). As detailed above, the defendant's conduct in this case was not only serious and repeated but carefully orchestrated to maximize the profits the reaped from his schemes. Over the course of more than a year, and in two separate schemes, the defendant created fictitious companies, e-mail accounts, investors, and entire stories meant to convince his victims to pay him tens and even hundreds of thousands of dollars under false pretenses.

The purely financial loss caused by the defendant, in some respects, pales in comparison to the broader effects of his crimes. By not only preying on financially desperate victims but then stringing them along for months on end – leading them to believe financing the defendant

knew could never materialize would, in fact, come through – the defendant decimated business plans, and derailed a full-scale Broadway production, one which was to have employed more than 100 theater personnel and played to thousands of theater goers each week. The defendant's callous disregard for the impact of his conduct – harm the loss amount reflected in the Guidelines analysis only begins to capture – warrants a substantial sentence of incarceration.

Second, a substantial sentence is necessary to afford adequate deterrence and to protect the public from further crimes of the defendant *See* 18 U.S.C. § 3553(a)(2)(B)-(C). The defendant is, without question, a serial fraudster—the two schemes to which he has pled guilty in this District reflect just a portion of the defendant's total criminal conduct—for whom deterrence is clearly an issue. As evinced by the conduct underlying both the instant charges as well as those pending in the Eastern District, the defendant has built his entire adult life on fraud and related criminal conduct, engaging in financial crimes dating back to 1995 and that span a period of nearly 20 years. That the defendant drew on that experience as a fraudster to target and then victimize sophisticated parties – a large Real Estate Company and a Broadway production – only further underscore the scope of his criminal conduct, and the need for a substantial period of incarceration to promote further future crimes.

Indeed, in this respect, the defendant's conduct while out on release – that is, the conduct which Probation relies on in urging this Court to deny any downward adjustment for acceptance of responsibility – should weigh heavily on the Court. As already found by Judge Seybert in the Eastern District, almost immediately after his release, the defendant engaged in a series of increasingly serious violations of the terms of that release, lying brazenly to Pretrial Services about his whereabouts; violating the conditions of home detention to which he was subjected; and most serious of all, particularly in light of the instant charges, fabricating documents and e-

mails, all as part of a scheme to avoid complying with the terms of his release. That the defendant quickly proved himself incapable of living under supervision – or, more generally, living a law abiding life – during a relatively brief period of release, speaks volumes about the risk of recidivism this defendant poses and the need for a substantial period of incarceration to promote specific deterrence.

III. CONCLUSION

For the foregoing reasons, the Government respectfully submits that a sentence within the Stipulated Guidelines Range of 33 to 41 months' imprisonment is appropriate here and would be sufficient, but not greater than necessary, to serve the legitimate purposes of sentencing.

Dated: New York, New York
October 6, 2014

Respectfully submitted,

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By: ___/s/___________________________
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